American Bankers Association
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Jonathan Thessin
Senior Counsel
Center for Regulatory Compliance
Phone: 202-663-5016
E-mail: Jthessin@aba.com

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Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Public Notice, Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision, CG Docket Nos. 18-152, 02-278 (released Oct. 3, 2018)

Dear Ms. Dortch:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Federal Communications Commission's (Commission) Public Notice released on October 3, 2018 (Public Notice).[2] The Public Notice seeks comment on which dialing equipment constitutes an "automatic telephone dialing system" under the Telephone Consumer Protection Act of 1991[3] (TCPA), in light of the September 20, 2018, decision by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*.[4]

I. Summary of Comment

ABA supports the Commission's ongoing effort to interpret and apply the TCPA's definitions consistent with the statute's text and congressional intent. Congress passed the TCPA in 1991 primarily to combat abusive telemarketers that used random and sequential algorithms to generate numbers used for mass calling campaigns, often tying up emergency and public safety-related phone lines by indiscriminately calling numbers.[5] To achieve these purposes, Congress

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.
[2] Public Notice, Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision, CG Docket Nos. 18-152, 02-278 (released Oct. 3, 2018) [hereinafter *Public Notice*].
[3] Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 *et seq.* (2012).
[4] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).
[5] See footnotes 27 and 28 and accompanying text.

imposed restrictions on calls made from an "automatic telephone dialing system," commonly known as an "autodialer." Congress defined an autodialer as "equipment which has the capacity-(A) to store or produce telephone numbers to be called, using a *random or sequential number generator*; and (B) to dial such numbers."[6] Significantly, an autodialer uses a random or sequential algorithm to generate numbers without regard to whether the numbers generated have been assigned to individual consumers, emergency services, healthcare providers, or public safety agencies.

Congress' intent in defining an autodialer in this manner is clear: to restrict the use of dialing equipment that creates numbers at random or sequentially (i.e., where each number dialed follows the last one in numeric order).[7] Congress did *not* intend to restrict technologies that merely facilitate the efficient dialing of numbers stored in databases compiled for a specific purpose, such as lists of numbers of a business' existing customers with whom the business needs to communicate. A dialing technology that calls stored lists of numbers is not an autodialer, because it does not meet the statutory test: the technology does not randomly or sequentially generate numbers to be called.

In issuing its decision in *Marks*, the Ninth Circuit panel interpreted the statutory definition of an autodialer in a manner that is inconsistent with the TCPA's text and legislative history. The *Marks* panel held that a device that calls from a stored list of numbers is an autodialer *even if* those numbers are not generated using a random or sequential number generator. Under *Marks*, an ordinary smartphone is an autodialer. This conclusion reflects "a reading of the statute [that] subjects not just businesses and telemarketers but almost all our citizens to liability for everyday communications."[8]

The Commission should disregard the *Marks* panel decision because it conflicts with the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*[9]—a decision the Commission is obliged to follow—and because *Marks* is inconsistent with the text of the TCPA and Congress' intent in passing the law. Instead, the Commission should grant the Petition for Declaratory Ruling submitted by the U.S. Chamber of Commerce, ABA, and 16 other groups that asks the Commission to confirm, consistent with the TCPA's text, (a) that to be an autodialer the calling equipment must use a random or sequential number generator to store or produce telephone numbers and to dial those numbers without human intervention; and (b) that only calls made using such actual autodialer capabilities are subject to the TCPA's restrictions (the Petition).[10]

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[6] 47 U.S.C. § 227(a)(1) (emphasis added).
[7] *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/sequential (defining "sequential" as "of, relating to, or arranged in a sequence : SERIAL") (last visited Oct. 24, 2018).
[8] Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd. 7961, 8076 (2015) (Pai, Comm'r, dissenting).
[9] *ACA Int'l v. FCC*, 885 F.3d 687 (2018).
[10] Petition for Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278 (filed May 3, 2018),

II. The Commission Is Precluded from Following the Ninth Circuit's Panel Decision in *Marks* When Issuing Interpretations of the Statutory Definition of an Autodialer

a. The Commission is Obliged to Follow the D.C. Circuit's Decision in *ACA International v. FCC*

It is undisputed that Congress provided the Commission with broad authority to "prescribe regulations to implement the requirements" of section (b) of the TCPA, which imposes restrictions on the use of an autodialer.[11] Consequently, the Commission is well within its authority to determine the scope of dialing equipment that falls within the statutory definition of an autodialer.

It is also well-established that a federal agency, such as the Commission, must act consistently with the decision of a reviewing court.[12] On March 18, 2018, the U.S. Court of Appeals for the District of Columbia ruled, in *ACA International v. FCC*, on the challenges brought against the Commission's Declaratory Ruling and Order issued on July 10, 2015 (2015 Order).[13] Because that decision resulted from the court's review of the 2015 Order, the Commission is obliged to follow it when issuing new interpretations of the TCPA.

In contrast, the Commission is *not* required to follow the Ninth Circuit's panel decision in *Marks*. That decision did not review a Commission ruling, as in *ACA International*, but simply was the court's interpretation of the autodialer definition in the context of the plaintiff's claim that a fitness company used an autodialer to send text messages to the plaintiff in violation of the TCPA.[14] Moreover, the panel decision in *Marks* may not reflect the ultimate disposition of that dispute; the defendant has petitioned for *en banc* review of the decision.[15] Thus, at a minimum, it is premature to give any weight to the *Marks* panel decision.

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https://www.aba.com/Advocacy/LetterstoCongress/Documents/cl-TCPA-20180503.pdf?utm_campaign=ABA-Newsbytes-050418&utm_medium=email&utm_source=Eloqua.

[11] 47 U.S.C. § 227(b)(2); *see also ACA Int'l v. FCC*, 885 F.3d 687, 693 (2018) (observing that the "TCPA vests the Commission with responsibility to promulgate regulations implementing the Act's requirements").

[12] *See* Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.9 (2010).

[13] Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd. 7961 (2015) [hereinafter *2015 Order*].

[14] *Marks*, No. 14-56834, slip op. at 15.

[15] *See* Appellee's Petition for Rehearing *En Banc*, *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. filed Oct. 4, 2018).

b. The Ninth Circuit's *Marks* Panel Decision Conflicts with the D.C. Circuit's Decision in *ACA International*

As the Commission suggested in its Public Notice, the *Marks* court's interpretation of the statutory definition of an autodialer conflicts with the D.C. Circuit's decision in *ACA International*.[16] Because the Commission must follow *ACA International*, it cannot follow *Marks*.

In *Marks*, the Ninth Circuit panel held that the TCPA's definition of an autodialer "includes devices with the capacity to dial stored numbers automatically" *even if* those numbers are not generated using a random or sequential number generator.[17] Significantly, an ordinary smartphone has the capability to dial stored numbers automatically, as the Commission found in its 2015 Order.[18]

The *Marks* panel's holding is inconsistent with the D.C. Circuit's decision in *ACA International*. In *ACA International*, the D.C. Circuit struck down the Commission's past interpretations of the statutory definition of an autodialer in part because those interpretations impermissibly expanded the scope of an autodialer to include "every smartphone."[19] The court concluded that an interpretation that captures the "most ubiquitous type of phone equipment" is "utterly unreasonable" because it is "incompatible" with Congress' intent when passing the TCPA to address abusive telemarketers.[20] The Commission cannot follow a decision whose holding is directly counter to a decision the Commission is obliged to follow.[21]

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[16] *Public Notice* at 2.
[17] *Marks*, No. 14-56834, slip op. at 23.
[18] *2015 Order* at 7970 ¶ 7 (finding that, with the use of "smartphone apps," "[c]alling and texting consumers *en masse* has never been easier or less expensive") (emphasis in original). The D.C. Circuit relied on this finding in its decision in *ACA International*. *See ACA Int'l*, 885 F.3d at 696.
[19] *ACA Int'l*, 885 F.3d at 697 ("The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions . . . ."); *see also id.* at 698 ("It is untenable to construe the term 'capacity' in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known . . . ."); *id.* ("It cannot be the case that every uninvited communication from a smartphone infringes federal law . . . .").
[20] *Id.* at 698 & 699 (internal quotation marks and citation omitted).
[21] Even in the absence of a conflict between *Marks* and *ACA International*, the Commission would be well within its authority to decline to follow *Marks*. Many agencies decline to follow circuit court decisions with which they disagree. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989) ("Over the past sixty years, many agencies have insisted, in varying degrees, on the authority to pursue their policies, despite conflicting court decisions, until the Supreme Court is prepared to issue a nationally binding resolution.").

c. The Ninth Circuit's *Marks* Panel Decision Is Inconsistent with the TCPA's Text and Legislative History

The statutory definition of an autodialer is clear and unambiguous: a device must "us[e] a random or sequential number generator" for the device to be an autodialer.[22] The *Marks* court impermissibly concluded that a device can be an autodialer without generating numbers in random or sequential order. The Commission should disregard the *Marks* court's erroneous conclusion when issuing interpretations of the TCPA.[23]

As stated earlier, in the TCPA, Congress imposed restrictions on calls made from an "autodialer," which it defined as "equipment which has the capacity- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[24] The structure of this provision compels one to read the phrase "random or sequential number generator" as modifying both "store" and "produce" in the antecedent phrase. Congress placed a comma between "to store or produce telephone numbers to be called" and "using a random or sequential number generator." Under the "punctuation canon," the placement of the comma indicates that Congress intended for the phrase that comes immediately after the comma ("using a random or sequential number generator") to modify the *entirety* of the phrase that precedes the comma ("to store or produce telephone numbers to be called").[25] As a result, a device must perform at least one of two functions to be an autodialer: the device must "store" numbers that were randomly or sequentially generated or "produce" such numbers. We agree with Chairman Pai that if a device cannot perform these functions—to store or produce numbers in random order or in sequential order—it cannot be an autodialer.[26] The *Marks* court disregards the punctuation canon in concluding that the phrase "using a random or sequential number generator" modifies only "produce" and not "store."

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[22] 47 U.S.C. § 227(a)(1).

[23] Because the statutory definition of an autodialer is clear and unambiguous, a reviewing court would not permit the Commission to deviate from the statute's terms. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("If the statutory language is plain, we must enforce it according to its terms.").

[24] 47 U.S.C. § 227(a)(1).

[25] *See Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) (relying on decisions from the Second, Third, Ninth, Eleventh, and Federal Circuits in support of the proposition that, under the punctuation canon, a "'qualifying phrase is supposed to apply to *all antecedents instead of only to the immediately preceding one* where the phrase is separated from the antecedents by a comma'") (quoting *Davis v. Devanlay Retail Grp., Inc.*, 785 F.3d 359, 364 n.2 (9th Cir. 2015)) (alterations omitted) (emphasis added).

[26] *2015 Order*, 30 FCC Rcd. at 8074 (Pai, Comm'r, dissenting) ("If a piece of equipment . . . *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition? It cannot.") (emphasis in original).

The legislative history of the TCPA further demonstrates that Congress intended to restrict the use of dialing equipment that creates numbers at random or sequentially—and not equipment that merely calls stored lists of numbers. Congress passed the TCPA primarily to control the shifting of telemarketers' advertising costs to consumers by the use of random and sequential generators to run mass calling campaigns.[27] These calling campaigns also tied up emergency and public safety-related phone lines by indiscriminately calling numbers.[28]

Notably, Congress found that the telemarketers perpetrating these harms "often program their systems to dial *sequential* blocks of telephone numbers, which have included those of emergency and public service organizations."[29] Dialing equipment with this ability to generate numbers randomly or sequentially caused the harms that Congress sought to address, and Congress imposed restrictions on this specific equipment. Congress did not identify, or seek to regulate, informational calls by businesses to stored lists of customer numbers.

Conclusion

ABA continues to support the Commission's efforts to issue interpretations of the TCPA that are consistent with the statute's text and congressional intent. We urge the Commission to disregard the *Marks* panel's interpretation of the statutory definition of an autodialer, which is inconsistent with the text of the TCPA, the intent of Congress, and the D.C. Circuit's decision in *ACA International*.

Sincerely,

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance

[27] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394 (2012) [hereinafter *TCPA*] (observing the "increased use of cost-effective telemarketing techniques"); H.R. Rep. No. 102-317, at 6 (1991) (observing that automatic dialing systems permit telemarketers to provide a message to potential customers "without incurring the normal cost of human intervention"); S. Rep. No. 102-178, at 2 (1991) (observing that the "advance of technology [has made] automated phone calls more cost-effective").
[28] *See TCPA* § 2(5) (observing that "[u]nrestricted telemarketing" can be a "risk to public safety" when "an emergency or medical assistance telephone line is seized").
[29] H.R. Rep. No. 102-317, at 10 (emphasis added); *see also* S. Rep. No. 102-178, at 2 (describing the harms Congress sought to address, including that "some automatic dialers will dial numbers *in sequence*, thereby tying up all the lines of a business and preventing any outgoing calls") (emphasis added).